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FILED
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IN THE

United States Supreme Court

OCTOBER TERM

No. 72-1074

BARBARA ANN MARTIN,

Petitioner.

v.

WESLEY JACKSON MARTIN,

Respondent.

Petition For A Writ of Certiorari
To The Supreme Court
of the State of Florida

MAHONEY, HADLOW, CHAMBERS & ADAMS
By: George L. Hudspeth, Esquire
Post Office Box 4099
Jacksonville, Florida 32201
Counsel for Petitioner

January 31, 1973

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IN THE

United States Supreme Court

OCTOBER TERM

No.

BARBARA ANN MARTIN,

Petitioner.

v.

WESLEY JACKSON MARTIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

The petitioner, BARBARA ANN MARTIN, prays that a writ of certiorari issue to review the order of the Supreme Court of Florida rendered in these proceedings on November 6, 1972.

OPINIONS BELOW

The final orders, without opinions, of the Supreme Court of Florida denying both petitioner's petition for a writ of certiorari to the District Court of Appeal, First District, and her petition for rehearing, are reported at 267 So. 2d 830, and appear at Appendix A, *infra*, pages 15 and 16. The

opinion of the District Court of Appeal, First District, and its order denying a petition for rehearing, are reported at 261 So.2d 179, and appear at Appendix B, *infra*, pages 17 through 26. The opinion of the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida, is unreported, and appears at Appendix C, *infra*, pages 27 and 28.

JURISDICTION

The final order of the Supreme Court of Florida was entered on November 6, 1972. See Appendix A, page 15, *infra*. This petition for certiorari was filed less than 90 days from November 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

Petitioner brought suit in the Florida court to enforce the provisions of a marital separation agreement executed in North Carolina. Respondent answered and filed a counterclaim seeking modification of the North Carolina separation agreement under Florida law. The questions thereby arising are:

1. Whether the actions of the Florida trial court, District Court of Appeal, and Supreme Court of Florida in applying Florida law to effect modification of a North Carolina contract that was not modifiable under the *lex loci contractus* constituted a violation of petitioner's constitutional rights under the due process clause of the Fourteenth Amendment, Article I, Section 10 (impairment of the obligation of contract), and/or Article 4, Section 1 (full faith and credit), all of the Constitution of the United States.

2. Whether the application by the Florida trial court, District Court of Appeal, and the Supreme Court of Florida of Florida Statutes, Section 61.14 (1969)—(before the 1971

amendment), to effect modification of the terms of a separation agreement executed in compliance with North Carolina General Statutes, Section 52-6, constituted a denial of full faith and credit to a judgment of the court of a sister state within the intent and meaning of Article IV, Section 1, of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

Constitution of the United States, Article I, Section 10:

> "No state shall . . . pass any . . . law impairing the obligation of contracts. . . ."

Constitution of the United States, Article IV, Section 1:

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. . . ."

STATEMENT OF THE CASE

In her Second Amended Complaint (R. 1-5, and exhibits 6-9).* petitioner sought a judgment for arrearages due her by the terms of her separation agreement with respondent in accordance with her rights under North Carolina law. The separation agreement (R. 6-9 or 19-22) was entered into by petitioner in consideration of her divorce from respondent at a time when both were citizens and residents of North Carolina (R. 17-18).

The Second Amended Complaint contained two counts. Count I pleaded that the separation agreement was a North

* References are to the pages of the record and Appendix before the Florida Supreme Court, certified to this court, which are designated as (App.) in that court, and are referred to here as (R.).

Carolina consent judgment (R. 1-4), and Count II pleaded that it was a North Carolina contract entitled to enforcement in accordance with North Carolina law (R. 4-5).

Respondent answered (R. 12) denying any liability, and counterclaimed (R. 13) asking that the separation agreement be cancelled or modified pursuant to Florida Statutes, Section 61.14 (1969), by reducing the support money due petitioner from respondent.

Florida Statutes, Section 61.14 (1969)—(before the 1971 amendment), provided in part as follows:

> 61.14 Modification of alimony judgment; agreements, etc.
>
> (1) When a husband and wife have entered or hereafter enter into an agreement for payments for, or instead of, support, maintenance or alimony, whether in connection with an action for divorce or separate maintenance or with voluntary property settlement or when a husband is required by court order to make any payments to his wife, and the circumstances of the parties or the financial ability of the husband has changed since the execution of such agreement or the rendition of the order, either party may apply to the circuit court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application or in which the agreement was executed or in which the order was rendered, for a judgment decreasing or increasing the amount of support, maintenance or alimony, and the court has jurisdiction to make orders as equity requires with due regard to the changed circumstances and the financial ability of the husband, decreasing or increasing or confirming the amount of separate support, maintenance or alimony provided for in the agreement or order.
>
> (2) Thereafter the husband shall pay only the amount of support, maintenance or alimony directed in

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the new order, and the agreement or earlier order is modified accordingly. . . .

(3) This section is declaratory of existing public policy and laws of this state which are hereby confirmed in accordance with the provisions hereof. It is the duty of the circuit courts to construe liberally the provisions hereof to effect the purposes hereof.

The cause was tried pursuant to a Stipulation of Facts R. 17-50), and testimony was taken at the trial. The trial stimony is irrelevant since it deals with the change in the rties' financial circumstances during the four years fol- wing execution of the separation agreement, and, therefore, s no bearing on the legal issues presented by petitioner.

The trial court applied Florida Statutes, Section 61.14 969) (as it existed prior to amendment by the 1971 orida Legislature), and held that, due to the changed ancial circumstances of the parties, "pursuant to Florida atutes, Section 61.14, the separation agreement . . . is odified as follows: the [respondent] shall not hereafter y any alimony to the [petitioner] unless required to do by further order of this court." (R. 51 and Appendix C, ge 27). The trial court retained jurisdiction, however, to quire the respondent to resume paying alimony to peti- ner in the event she should become unable to work to pport herself.

Petitioner appealed the final judgment to the District urt of Appeal, First District, which filed an opinion ppendix B, *infra,* pages 18 through 26) affirming the ion of the trial court in refusing to recognize and enforce separation agreement as a foreign judgment, and in difying the amount and duration of payments accruing ler the separation agreement. The District Court of peal did, however, reverse the action of the trial court

in failing to enter a judgment for petitioner for all unpaid amounts due her from the date of the first default by respondent under the separation agreement to the date of the final judgment (R. 59).

Petitioner filed a petition for rehearing (R. 62-63), which was denied by the District Court of Appeal, First District (R. 64 and Appendix A, page 1).

Petitioner next filed a petition for writ of certiorari with the Florida Supreme Court (R.) for review of the decision of the District Court of Appeal, First District. The Supreme Court of Florida denied the petition on the grounds that it was without jurisdiction and subsequently denied petitioner's petition for rehearing (Appendix A, page 15 through 16).

REASONS FOR GRANTING THE WRIT

1. IMPAIRMENT OF OBLIGATION OF CONTRACT

THE DECISIONS BELOW DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT AND OTHER FEDERAL AND STATE COURTS CONSTRUING THE DUE PROCESS AND FULL FAITH AND CREDIT PROVISIONS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION AS IT RELATES TO IMPAIRMENT OF THE OBLIGATION OF CONTRACT.

In *Scudder v. Union National Bank*, 91 U.S. 406, 412 (1875), and innumerable decisions subsequent thereto, this Court has held that questions involving the validity and interpretation of a contract are to be determined by the law of the place where the contract is made; matters pertaining to performance of the contract are regulated by

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the law of the place where the contract is to be performed; and "matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitations, depend upon the law of the place where the suit is brought."

Though parties to a contract may agree that the law of a state other than that in which the agreement is executed is to govern its performance, *Pinney v. Nelson*, 183 U.S. 144 (1901), where, as here, there is no express provision as to the place of performance, the law presumes that it is to be performed in the state of execution. *Pritchard v. Nelson*, 106 U.S. 124 (1882).

In addition, this Court in *Pritchard*, 106 U.S. at 131, also held:

> The principle that what is apparently mere matter of remedy in some circumstances, in others, where it touches the substance of the controversy, becomes matter of right, is familiar in our constitutional jurisprudence in the application of that provision of the Constitution of the United States which prohibits the passing by a state of any law impairing the obligation of contracts. For it has been uniformly held that "Any law which in its operation amounts to a denial or obstruction of the rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. . . .'

In *Hartford Accident and Indemnity Company v. Delta and Pine Land Company*, 292 U.S. 143, 149 (1934), this Court reviewed a lower court decision wherein a Mississippi court had refused to give effect to a provision of a contract executed in Tennessee on the ground that the provision, though valid in Tennessee, conflicted with the public policy of Mississippi against agreements purporting to shorten the period of the statute of limitations. In reversing the Mississippi court, this Court held that although a state may

prohibit the making of certain contracts within its own territory, it may not extend the effect of its laws beyond its own boundaries so as to destroy or impair contract rights validly accruing under the laws of another jurisdiction.

This Court also held that a state may not "in an action based upon such a [foreign] contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that *one of the parties is its own citizen.*" 292 U.S. at 149. (Emphasis added)

In concluding its opinion in *Hartford,* this Court said (pp. 149-150):

> The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws . . . it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. . . .

In *Bradford Electric Light Company v. Clapper,* 286 U.S. 145 (1932), this Court held that, in the event of con-

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flicting public policies between a forum and the *lex loci contractus,* the forum *may,* under some circumstances, be justified in refusing to affirmatively enforce a right accruing under a foreign contract. By so doing, the forum leaves the substance of the contract intact, thereby merely denying the plaintiff a remedy, and leaving him free to enforce whatever substantive rights he might have in another jurisdiction. However, the refusal by the courts of the forum to recognize a *defense* to an action on a foreign contract has an entirely different effect. By declining to recognize a valid defense, the courts of the forum allow a liability to attach to one of the parties which did not exist under the *lex loci contractus,* and which was, in all likelihood, not in the contemplation of the parties at the time of contracting. Thereby the court, in effect, creates a new contract between the parties, to comport with the dictates of its own local public policy, in violation of the contracting parties' constitutional rights under Article I, Section 10 (impairment of obligation of contract), Section 1 of the Fourteenth Amendment (due process of law), and Article IV, Section 1 (full faith and credit), all of the Constitution of the United States. *Home Insurance Company v. Dick,* 281 U.S. 397 (1930); *Holderness v. Hamilton Fire Insurance Company of New York,* 54 F. Supp. 145 (S.D. Fla. 1944); *Confederation Life Association v. Ugalde,* 151 So.2d 315 (Fla. App. 3rd 1963), *rev'd. on other grounds,* 164 So.2d 1 (Fla. 1964).

There is no dispute that the separation agreement was executed in North Carolina by North Carolina citizens and in conformity with the laws of that state. In North Carolina, separation agreements are regarded as contracts. *Kiger v. Kiger,* 258 N.C. 126, 128 S.E.2d 235 (1962). They are, therefore, subject to the rules governing the interpretation of contracts. *Church v. Hancock,* 261 N.C. 764, 136 S.E.2d 81 (1964).

Under North Carolina law, separation agreements are binding and conclusive upon the parties, *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964), and cannot be changed or set aside except with the consent of both contracting parties. *Vann v. Vann*, 262 N.C. 67, 136 S.E.2d 240 (1964); *Bowles v. Bowles*, 237 N.C. 462, 75 S.E.2d 413, 415 (1953). A subsequent change of circumstances of either party does not constitute grounds for modification of separation agreements under North Carolina law. *Archbell v. Archbell*, 158 N.C. 408, 78 S.E. 327 (1912).

The substantive laws of Florida, whose only contact with the contractual obligation was that respondent took up residence there subsequent to the execution of the contract, should not have been applied by the Florida courts. The applicable law was that of North Carolina. By applying the modification statute of Florida, the Florida courts destroyed the substance of the contract and impaired its obligations.

The modification by the Florida courts of a binding North Carolina separation agreement presents an important constitutional question never before directly decided by this Court, so far as this writer can determine. To uphold the determination of the Florida courts will seriously undermine the stability of postnuptial settlement agreements by allowing states other than the *lex loci contractus* to apply local public policies to effect an alteration of contractual obligations already fixed under the laws of another jurisdiction.

If the decision below is not corrected, the result will be the creation in Florida of a haven for spouses seeking to avoid their obligations under postnuptial contracts that are binding upon them under the *lex loci contractus*. Our Constitutional protections are deserving of more substance than that.

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2. FULL FAITH AND CREDIT

THE DECISION BELOW CONFLICTS WITH ARTICLE IV, SECTION I OF THE CONSTITUTION OF THE UNITED STATES IN THAT IT FAILS TO GIVE FULL FAITH AND CREDIT TO THE "FINAL JUDGMENT" STANDING OF THE SEPARATION AGREEMENT BETWEEN PETITIONER AND RESPONDENT.

This Court has held that the purpose of the full faith and credit clause is to preserve rights acquired or confirmed under the public acts and judicial proceedings of one state by requiring recognition of their validity in others, *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941), and to establish that a cause once pursued to judgment in one jurisdiction shall be as conclusive of the rights of the parties in every court as in that in which it was rendered. *Magnolia Petroleum Company v. Hunt*, 321 U.S. 430 (1944).

Similar decisions of this Court have held that in actions to enforce a foreign judgment, the only defenses available to a party in the forum are those that are good in the state where the judgment was rendered. *Roche v. McDonald*, 275 U.S. 449 (1928).

North Carolina General Statutes, Section 52-6, as it existed in 1966 when the instant separation agreement was executed, provided as follows:

> (a) No contract between husband and wife made during their coverture shall be valid to effect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, *nor shall any separation agreement between the husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged*

before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. *The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.*

(c) Such certifying officer must be a justice of the Supreme Court, a judge of the superior court, a judge of the district court, a clerk, assistant clerk, or deputy clerk of the superior court, *or a justice of the peace,* or a magistrate, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination is made. [Emphasis added]

Petitioner and respondent stipulated that their separation agreement was executed in conformity with that statute (R. 22).

In North Carolina "a consent judgment is the consent of the parties entered upon the records of a court of competent jurisdiction with its sanction and approval," *State Highway Commission v. Rowson,* 5 N.C. App. 629, 169 S.E.2d 132, 134 (1969), and such judgment is not "strictly a judgment rendered by a court pursuant to its inherent power to hear and determine a controversy, but is merely a contract of the parties" that has received the approval of the court. *Lee v. Rhodes,* 227 N.C. 240, 41 S.E.2d 747, 748 (1947).

North Carolina courts have held that a consent judgment has "the same force and effect as if [it] had been entered by the Court in regular course, and, in that sense,

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[it] becomes the Court's judgment by virtue of its sanction in receiving it and ordering it to be spread on its records." *Edmundson v. Edmundson,* 222 N.C. 181, 22 S.E.2d 576, 580 (1942). "Such a judgment may be entered and given effect as to any matters of which the court has general jurisdiction. . . ." *Holloway v. Durham,* 176 N.C. 550, 97 S.E. 486, 487 (1918).

In *Harding v. Harding,* 198 U.S. 317 (1905), this Court held that decrees entered by consent are as binding and conclusive upon parties as judgments at law, and consent judgments are entitled to the benefits of the full faith and credit clause of the United States Constitution. See also, *Yarborough v. Yarborough,* 290 U.S. 202 (1933).

The separation agreement in the instant case satisfied all the requisites of North Carolina General Statutes, Section 52-6, contained all proper signatures, and was executed, witnessed, acknowledged, approved and recorded in the public records of North Carolina as required by the laws of that state (R. 22-26). The North Carolina statute confers upon a justice of the peace authority to certify that a separation agreement is not injurious to the interests of the wife, and provides that such certification "shall be conclusive of the facts stated therein," except that it might be impeached for fraud "as other judgments may be."

No allegations of fraud were made by respondent, and no proof of fraud was offered by him at the trial. The clear intent of the statute, therefore, is that a certification by the justice of the peace possess the finality of a judgment.

Under the full faith and credit clause, the Florida courts were required to give the same credence to the parties' agreement as it would have received in the courts of North Carolina. *Williams v. North Carolina,* 317 U.S. 28 (1947).

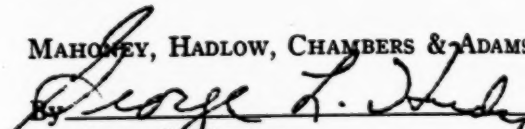
By allowing modification of the agreement, even though no fraud was alleged or proven, the Florida courts failed to accord the agreement the finality and conclusiveness conferred upon it by the law of North Carolina, and thereby violated petitioner's rights as guaranteed under Article IV, Section 1, of the Constitution of the United States.

CONCLUSION

For the reasons above stated, a writ of certiorari should issue to review the judgment of the Florida Supreme Court.

Respectfully submitted,

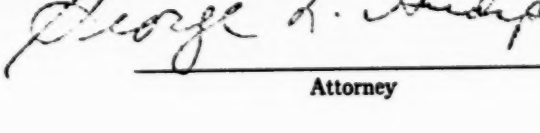
MAHONEY, HADLOW, CHAMBERS & ADAMS

By 

GEORGE L. HUDSPETH
Attorneys for Petitioner
Post Office Box 4099
Jacksonville, Florida 32201

CERTIFICATE OF SERVICE

I CERTIFY that three copies hereof have been furnished to Sidney E. Lewis, Esquire, of Goldman, Presser, Lewis & Nussbaum, attorneys for respondent, 549 Florida National Bank Building, Jacksonville, Florida 32202, by mail, postage prepaid, this 31st day of January, 1973. I further certify that all parties required to be served have been served.



Attorney

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APPENDIX A

[Reported at 267 So.2d 830]

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1972
MONDAY, NOVEMBER 6, 1972

BARBARA ANN MARTIN,
Petitioner,

vs.

WESLEY JACKSON MARTIN,
Respondent.

Case No. 42,459

On consideration of the petition for rehearing filed by attorneys for petitioner and reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS and DEKLE, JJ., concur

CC: Mahoney, Hadlow, Chambers & Adams
(Hon. George L. Hudspeth,
Hon. William E. Williams)
Goldman, Presser, Lewis & Nussbaum
(Hon. Sidney E. Lewis)
Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. Roger J. Waybright, Judge

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

By: /s/ Dave Lang, Jr.
DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

(I HAVE TODAY MAILED TO THE CLERK OF THE FIRST DISTRICT COURT OF APPEAL ORDER OF SEPTEMBER 26, 1972.)

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APPENDIX A

[Reported at 267 So.2d 830]

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1972
TUESDAY, SEPTEMBER 26, 1972

BARBARA ANN MARTIN,
Petitioner,

vs.

WESLEY JACKSON MARTIN,
Respondent.

Case No. 42,459

DISTRICT COURT OF APPEAL, FIRST DISTRICT

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS and DEKLE, JJ., concur

CC: Hon. Raymond E. Rhodes, Clerk
Hon. S. Morgan Slaughter, Clerk
Hon. Roger J. Waybright, Judge
Mahoney, Hadlow, Chambers & Adams
(Hon. George Hudspeth)
(Hon. William E. Williams)
Goldman, Presser, Lewis & Nussbaum
(Hon. Sidney E. Lewis)

A True Copy
TEST:
Sid J. White
Clerk Supreme Court

By: /s/ Dave Lang, Jr.
DAVE LANG, JR.
Chief Deputy Clerk
Supreme Court of Florida

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APPENDIX B

[Reported at 261 So.2d 179]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972

BARBARA ANN MARTIN,
Appellant,

vs.

WESLEY JACKSON MARTIN,
Appellee.

Case No. P-334

ORDER

Petitions for rehearing having been considered,
IT IS ORDERED that the petitions are hereby denied.

WITNESS the Honorable Sam Spector, Chief Judge, and Seal of the Court this 10th day of May, A.D. 1972.

Raymond E. Rhodes

/s/ Raymond E. Rhodes
Clerk

A True Copy
ATTEST:

/s/ Raymond E. Rhodes
Raymond E. Rhodes
Clerk, First District Court of Appeal
Tallahassee, Florida

APPENDIX B

[Reported at 261 So.2d 179]

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A.D. 1972

BARBARA ANN MARTIN,
Appellant,
vs.
WESLEY JACKSON MARTIN,
Appellee.
} Case No. P-334

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING PETITION AND
DISPOSITION THEREOF IF FILED.

Opinion filed April 20, 1972.

An Appeal from the Circuit Court for Duval County.
Roger J. Waybright, Judge.

George L. Hudspeth, of Mahoney, Hadlow, Chambers & Adams, for Apellant.

Sidney Lewis, of Goldman, Presser, Lewis & Nussbaum, for Appellee.

WIGGINTON, J.

Plaintiff has appealed an adverse final judgment, rendered by the Circuit Court of Duval County, which denied her prayer for judgment against defendant for past due support and maintenance under the terms of a separation agreement entered into between the parties prior to their

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divorce, and which modified the separation agreement by relieving the husband from making any payments to plaintiff as required thereby until further order of the court.

From the record before us it appears that the material facts on which this case was decided are not in dispute. The parties were married while residents of North Carolina where they lived during the entire period of their marriage which lasted approximately eight years and as a result of which no children were born.

On February 11, 1966, appellant brought an action for divorce against appellee in the Superior Court of Forsyth County, North Carolina. To the complaint appellee filed an answer and a counterclaim for divorce on his own behalf. During the pendency of the action the parties entered into what is described as a separation agreement by which they purported to settle their respective interests in certain real and personal property accumulated by them during their marriage. One of the provisions in the agreement provides that appellee pay to appellant for her support and maintenance the sum of $200.00 per month, which payments shall continue until death or remarriage of appellant. The agreement also provides that upon its execution appellee will withdraw his answer and appellant will take a voluntary nonsuit in her action, all with the understanding that the husband may file an amended answer requesting a divorce from his wife by reason of their separation over the required time.

The separation agreement was executed and acknowledged by the parties in compliance with all of the formalities required by the laws of North Carolina. An order was thereupon entered in the pending divorce proceeding, reciting that the matters and things in controversy with regard to the plaintiff's action had been settled between the

parties and, therefore, the plaintiff's motion for a nonsuit was granted and the cause dismissed at the cost of defendant. Appellee's counterclaim for divorce against appellant was filed, and a final judgment of divorce was rendered by the Superior Court of North Carolina by which the bonds of matrimony existing between the parties were dissolved.

Appellee paid to appellant the support payments of $200.00 monthly as required by the separation agreement through the month of October, 1968, but has failed or refused to make any further payments since that date. In the meantime appellee moved to Duval County in Florida where he was residing at the time of the institution of this action.

By her complaint filed in this cause appellant alleged in count one thereof the history of this case as recounted above and further alleged that the separation agreement entered into between the parties constitutes a "consent judgment" under the laws of North Carolina which cannot be enforced in that state because appellee has removed himself to the State of Florida. The complaint prays that the "consent judgment" held by her be established as a foreign judgment under the full faith and credit clause of the United States Constitution. It is further prayed that a money judgment for past due support and maintenance in the sum of $5,800.00 due under the consent judgment be awarded her.

Count two of the complaint realleged the allegations of count one and further alleged that the separation agreement constitutes a contract which appellee has breached by failing or refusing to pay to her the sum of $200.00 per month for her maintenance from October, 1968, to date. Appellant alleged that the amount due and owing to her from appellee under the terms of the contract is the sum of

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$5,800.00 as of March 10, 1971, and she prays for a money judgment against appellee in the amount found to be due.

By his answer appellee admitted the first five paragraphs of the complaint which alleged that the parties were married and had been divorced by final judgment rendered by the Superior Court of Forsyth County in the State of North Carolina. Appellee denied all the remaining allegations of both counts one and two of the complaint and demanded strict proof. In addition to his answer, appellee filed a counterclaim in which he acknowledged execution of the separation agreement referred to in the complaint, a copy of which was attached as an exhibit thereto. Appellee affirmatively alleged that at the time such agreement was entered into appellant was hospitalized in a sanitarium in North Carolina, was not employed, and had no source of income other than that furnished by appellee. Appellee further alleged that since the execution of the agreement the circumstances of the parties have substantially changed in that appellant is now able to be and is gainfully employed and, therefore, appellee should not be required to continue paying to her the amounts for her maintenance as stipulated in the separation agreement. Appellee therefore prayed that because of the changed circumstances of the parties the court enter its judgment cancelling or decreasing the amount of support which appellee would be required to pay appellant under the terms of the agreement.

It is appellant's contention that the trial court erred in refusing to recognize and enforce the separation agreement as a foreign judgment of the State of North Carolina under the full faith and credit clause of the United States Constitution.[1] Despite such contention, appellant has cited no

[1]"Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. * * * " Art. IV, § 1, United States Constitution.

authority, and our research has revealed none, whereby it has been held by the courts of North Carolina or elsewhere that a separation agreement entered into between a husband and wife preliminary to a judgement of divorce constitutes a final judgment of a court of competent jurisdiction possessing those attributes necessary to entitle it to recognition by a foreign state under the full faith and credit clause of the Constitution. It is to be noted that the divorce action between the parties was pending in the Superior Court of Forsyth County, North Carolina, at the time the agreement was executed. The agreement was certified to by a justice of the peace in Buncombe County, North Carolina. There was no proceeding pending in the justice of the peace court of the latter county in which the separation agreement could possibly by considered as a consent judgment as contended by appellant. The agreement was never introduced in evidence or made a part of the record in the divorce proceedings between the parties, nor was the agreement or any of its provisions referred to, ratified, confirmed, or made a part of the final judgment of divorce which was ultimately entered by the Superior Court of Forsyth County. We therefore hold that the trial court was eminently correct in its refusal to recognize the separation agreement as a foreign judgment entitled to recognition in this state under accepted principles of law.

Appellant also contends that since the separation agreement was voluntarily and understandingly entered into free of fraud or coercion, and that it in fact was a consideration for her dismissing her action against appellee and permitting him to secure a judgment of divorce from her, he is irrevocably bound by the terms thereof and is estopped to seek a modification of the provision by which he agreed to pay her the sum of $200.00 monthly for her support and maintenance. She therefore asserts that the trial court erred in

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granting appellee's counterclaim and relieving him from any further monetary obligations under the separation agreement until further order of the court.

Section 61.14, F.S., relating to modification of alimony judgments and agreements authorizes the court to modify support and maintenance obligations due by one spouse to another when circumstances of the parties have so changed as to require such modification, whether the obligation to pay emanates from a separation agreement or a judgment rendered by a court of competent jurisdiction. It would therefore appear that the legal status of a spouse's obligation to pay support and maintenance to the other party of the marriage arising under a separation or property settlement agreement is the same as that arising under a valid order rendered by the court, either of which may be modified upon a proper showing that the circumstances of the parties have changed.[2] In Posner, the Supreme Court said:

> "The question of the future binding effect of such antenuptial agreements when presented to the Chancellor for approval and incorporation in the final decree, *and the question of the modification thereof upon a showing of a change in circumstances after the entry of the decree of divorce,* should be decided under applicable statutory law and judicial decisions relating to postnuptial contracts settling the alimony and/or property rights of the parties." [Emphasis supplied]

It is our view, and we so hold, that even though the parties agreed to the amount and duration of support payments to be thereafter made by appellee to appellant, such provision was subject to later modification by the court upon a proper showing of changed circumstances. The evidence

[2]Posner v. Posner (Fla. 1970), 233 So.2d 381, 385, (Fla. 1972) Case No. 41,067, opinion filed March 8, 1972, not yet reported; Del Vecchio v. Del Vecchio, (Fla. 1962) 143 So.2d 17.

in the case sub judice establishes that at the time appellee agreed to pay support and maintenance to his then wife, she was ill and receiving treatment in a sanitarium in North Carolina. Since that time she has apparently recovered her health and become gainfully employed in an occupation which enables her to earn in the neighborhood of $9,000.00 a year. Under the circumstances, the trial court found, and we agree, that the demonstrated ability of appellant to earn a living for herself no longer requires compliance by appellee with the financial obligations assumed by him in the separation agreement. The trial court's judgment relieving appellee from making further payments to appellant for support until further order of the court cannot be held to constitute an abuse of discretion or departure from the essential requirements of law. By the final judgment rendered herein the court retained jurisdiction to require appellee to resume paying alimony to appellant in the event she should become unable to work and support herself. It is our view that this protective provision of the final judgment is fair to the parties and sufficient to insure that appellant's future needs will be cared for.

Lastly, appellant asserts that the trial court erred in denying her the relief prayed for in count two of her complaint. As indicated above, this count is based on the contract of the parties and alleges that appellee has breached the terms thereof by failing and refusing to pay her the monthly amounts agreed upon from October, 1968, to the institution of this action.

There can be no question but that the separation agreement involved in this case was not merged in the final decree of divorce rendered by the Superior Court of Forsyth County in North Carolina. In the case of Underwood v. Underwood,[3] the Supreme Court of Florida said:

[3]Underwood v. Underwood, (Fla. 1953) 64 So.2d 281, 287.

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> "The Court has repeatedly held, along with practically every other Court in the land, that property settlements between husband and wife made in good faith are valid and legal and should not be disturbed by the Courts. Vance v. Vance, 143 Fla. 513, 197 So. 128. That these agreements should be construed and interpreted as other contracts is no longer open to question. Bergman v. Bergman, 145 Fla. 10, 199 So. 920. *** "

The above holding by Florida conforms to the general rule recognized in this country:

> "Where the circumstances are such that the agreement, although incorporated or approved in the decree, is not merged therein, the parties may enforce it by suing on the agreement rather than on the judgment. * * * "[4]

Based upon the foregoing authorities, it is our view that the appellant was not required to first seek the aid of the Superior Court of Forsyth County in which the divorce decree was rendered for reduction to a money judgment of the delinquent amount of support payments due her by appellee as a condition precedent for seeking enforcement of her rights under the agreement in the Circuit Court of Duval County in Florida.

It is our view that the agreement is a valid contract between the parties and that the provision thereof regarding support payments to be made by appellee to appellant was binding and enforceable until modified by a proper proceeding instituted in a court of competent jurisdiction. There is no dispute regarding the failure or refusal of appellee to pay the monthly amount of support money called for in the separation agreement over the period of time alleged in the complaint. Under these circumstances it is our view, and

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[4] 24 Am. Jur. 2d 1048, Divorce and Separation, § 920.

we so hold, that appellant was entitled to a judgment against appellee for all accrued payments due her under the separation agreement and that the court erred in denying the relief prayed for in count two of the complaint.

The judgment appealed is affirmed in part and reversed in part. The cause is remanded with directions that an amended final judgment be entered in favor of appellant under count two of the complaint for such amounts as may be found to be due her under the separation agreement from the date of first default to the date final judgment was rendered herein by the trial court on June 3, 1971.

SPECTOR, Chief Judge, and JOHNSON, J., CONCUR.

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APPENDIX C

IN THE CIRCUIT COURT OF
DUVAL COUNTY, FLORIDA.
DIVISION B.
CIVIL ACTION NO. 71-1047

BARBARA ANN MARTIN,
Plaintiff,

vs.

WESLEY JACKSON MARTIN,
Defendant.

FINAL JUDGMENT

The trial of this action was held from 2:00 p.m. to 3:00 p.m. on June 2, 1971.

The court's findings and conclusions were stated orally at the end of the trial, taken down by a court reporter, and are incorporated in this final judgment by reference.

Upon consideration, it is ADJUDGED that:

1. Pursuant to Florida Statues § 61.14, the separation agreement entered into by the parties on July 19, 1966, providing in ¶ 6 thereof that the defendant would pay $200.00 per month to the plaintiff as alimony, is modified as follows: The defendant shall not hereafter pay any alimony to the plaintiff unless required to do so by further order of this court.

2. Jurisdiction is retained to require the defendant by post-judgment order to resume paying alimony to the plaintiff in an amount specified in that post-judgment order in the event the plaintiff is unable to work to support herself.

Jacksonville, Florida, June 3, 1971.

(c) Roger J. Waybright

Judge

Copies: George L. Hudspeth
Joel L. Goldman

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